

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

WIZARDS OF THE COAST LLC,

Plaintiff,

v.

CRYPTOZOIC ENTERTAINMENT, LLC,
and HEX ENTERTAINMENT, LLC,

Defendants.

Civil Action No.

COMPLAINT FOR COPYRIGHT,
PATENT AND TRADE DRESS
INFRINGEMENT

JURY TRIAL REQUESTED

Plaintiff Wizards of the Coast LLC (“Wizards”) hereby alleges the following causes of action against Defendants.

I. NATURE OF THE ACTION

1. This action results from Defendants’ blatant and willful misappropriation and infringement of some of Wizards’ most valuable intellectual property assets pertaining to its “Magic: The Gathering®” trading card game and trading cards (“Magic”).

2. Wizards is a worldwide leader in the trading card game and role-playing game categories, and a leading developer and publisher of game-based entertainment products. Wizards develops, manufactures, and distributes the popular and unique Magic trading card game in both paper and digital formats.

1 3. Upon information and belief, in a deliberate attempt to profit from Wizards’
2 valuable intellectual property and hard-earned reputation, Cryptozoic Entertainment, LLC
3 (“Cryptozoic Entertainment”) and Hex Entertainment, LLC (“Hex Entertainment”) (collectively
4 “Cryptozoic”) have, in the game “Hex: Shards of Fate,” (“Hex”) copied the look and feel, the
5 ornamental aspects, and the pleasing and ornamental layout of the functional features of Magic
6 trading cards. Cryptozoic Entertainment and Hex Entertainment have, further, implemented
7 those copied playing cards in promulgation of a game that substantially duplicates the
8 mechanics, plot, actions and elements of Magic, often retaining the same name for actions within
9 the game play. Moreover, Cryptozoic’s willful intent to trade off of Wizards’ intellectual
10 property and to create a false association between Hex and Magic is evident by the fact that it
11 chose to copy the distinctive Magic playing pieces. Wizards brings this suit to address its
12 considerable losses and prevent the willful infringement of its valuable intellectual property
13 rights. Cryptozoic’s willful and malicious misappropriation has caused and will continue to
14 cause irreparable and continuing harm to Wizards.

15 II. JURISDICTION AND VENUE

16 4. This Court has original jurisdiction over this action pursuant to 28 U.S.C. §§ 1331
17 and 1338 because this action alleges violations of federal statutes including the Copyright Act
18 (17 U.S.C. § 101), the Lanham Act (15 U.S.C. §§ 1114), and the Patent Act (35 U.S.C. §§ 101).

19 5. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §
20 1332 (diversity jurisdiction).

21 6. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b)(2) as Defendant
22 has committed tortious acts in this jurisdiction; a substantial part of the events giving rise to the
23 claim occurred here; and a substantial part of the property that is the subject of the action is
24 situated here.

III. THE PARTIES

7. Wizards is a Delaware limited liability company, maintaining its principal place of business at 1600 Lind Avenue Southwest, Suite 400, Renton, Washington 98057.

8. Cryptozoic Entertainment is a California limited liability company maintaining its principal place of business at 25351 Commercentre Drive, Suite 250, Lake Forest, California 92630. Hex Entertainment is a California limited liability company maintaining its principal place of business at the same address as that of Cryptozoic Entertainment, 25351 Commercentre Drive, Suite 250, Lake Forest, California 92630. In a fundraising effort on the Kickstarter.com website, Cryptozoic Entertainment is identified as the entity developing the Hex: Shards of Fate game; yet, when individuals have supported the development of the game, they have received email correspondence from Hex Entertainment. Upon information and belief, Cryptozoic Entertainment and Hex Entertainment are cooperating in the development of the Hex: Shards of Fate game for their mutual benefit such that actions complained of herein of one are legally chargeable to the other. Hex Entertainment is merely an “alter ego” of Cryptozoic Entertainment. For this reason, the allegations of this complaint identify the Defendants, collectively, as “Cryptozoic.”

IV. GENERAL ALLEGATIONS

9. Magic: The Gathering is a trading card game created by Richard Garfield and first published in 1993 by Wizards of the Coast. Magic is a true original--the first collectable trading card game produced. Recognized for its unique game play, Magic has won numerous awards, including the *Mensa Select Award*, the Origins Awards for *Best Fantasy or Science Fiction Board Game* and the *Best Graphic Presentation of a Board Game*, the Deutscher Spiele Preis’ *Special Award for New Game Mechanics*, the Italian Gaming Society’s *Gioco dell’Anno Award* and the Super As d’Or award for *Best New Game Concept and Genre Introduced in France*. Magic has attracted a large following and continues to thrive, with more than twelve million players as of 2013. Magic can be played by two or more players each using a deck of printed

1 cards or a deck of virtual cards through the Internet-based games, Magic: The Gathering Online
2 (“Magic Online”) and Magic: The Gathering – Duels of the Planeswalkers (further described
3 below).

4 10. Magic is currently available in eleven languages – English, French, German,
5 Italian, Russian, Spanish, Portuguese, Japanese, Spanish, Chinese Traditional and Chinese
6 Simplified, with players and fans in more than 70 countries worldwide.

7 11. Magic is played using elaborately illustrated cards that transport players into an
8 imaginary realm in which they do battle with one another. In playing Magic, players take on the
9 role of Planeswalkers – powerful mages who battle others for glory, knowledge, and conquest.
10 Each game represents a battle between Planeswalkers, who employ spells, artifacts, and creatures
11 depicted on individual Magic cards to defeat their opponents. A player starts the game with
12 twenty “life points” and loses the game when he or she is reduced to zero life points. Players lose
13 life points when they are dealt “damage” by being attacked with summoned creatures or when
14 spells or other cards cause them to lose life directly. A player can also lose if he or she must
15 draw from an empty deck (called the “library”) during the game.

16 12. Each Magic card, approximately 63 x 88 mm in size (2.5 by 3.5 inches), has a
17 “face” which displays the card's name, an illustration appropriate to the card's concept, and
18 written instructions which direct how that card can be played. Approximately fourteen thousand
19 (14,000) unique cards have been produced for the game as of March, 2014, many of them with
20 variant editions, artwork, or layouts, and 600–1000 new cards are added each year. Wizards has
21 printed over six and one-half billion (6,500,000,000) copies of the game worldwide. Magic is
22 typically played by two or more players, each of whom has his or her own unique library of
23 cards from which the player assembles a deck of 60 cards to play the game.

24 13. Players begin the game by shuffling their decks and then drawing seven cards.
25 Players draw one card at the beginning of each turn, except the first player on the first turn.
26 Players alternate turns consisting of several phases. Most cards can only be played during the

1 main phase of the player's own turn. The player whose turn it is always has the first chance to
2 play cards. At the end of a player's turn, if that player has more than seven cards in hand, the
3 player discards until his or her hand contains seven cards. The contents of other players' decks
4 and hands are not usually known to players.

5 14. The two basic kinds of cards in Magic are “lands” and “spells.” Land cards
6 provide “mana,” or magical energy, which is used as magical fuel when the player attempts to
7 cast spells. Players may only play one land card per turn. More powerful spells cost more mana,
8 so more mana becomes available as the game progresses, and the quantity and relative power of
9 the spells played tends to increase. Some spells also require the payment of additional resources,
10 such as cards in play or life points. Spells come in several varieties: “sorceries” and “instants”
11 have a single, one-time effect before they go to the “graveyard” (discard pile); “enchancements”
12 and “artifacts” are “permanents” which remain in play after being cast to provide a lasting,
13 magical effect; “creature” spells (also a type of permanent) summon creatures that can attack and
14 damage an opponent. The Magic card set *Lorwyn* introduced the “Planeswalker” card type,
15 which represents a powerful hero who fights with his or her own magic abilities.

16 15. The popularity and sophistication of Magic is such that tournaments of all sizes
17 regularly occur, including tournaments with many hundreds of players from various countries. In
18 1994, Wizards instituted the DCI, the official sanctioning body for enforcing rules and
19 promoting fairness in competitive Magic tournament play. The DCI publishes tournament rules
20 and operating procedures and sanctions tournaments. Since its inception, the DCI has sanctioned
21 more than 3 million tournaments worldwide and millions of unique players.

22 16. Players can purchase starter game sets, theme decks and booster packs to add to
23 their libraries of cards from which they construct decks.

24 17. Magic Online is an Internet based video game operated by Wizards that utilizes
25 the same mechanics and game play of Magic, thereby allowing players to play across great
26

1 distances and outside of one another's immediate presence. Magic Online went "live" on June
2 24, 2002. Magic Online users can play the Magic game or trade digital cards with other users.

3 18. Magic Online is played as an electronic analogue to the physical card game such
4 that strategy and mechanics learned in the trading card version of Magic are immediately
5 transferrable to Magic Online. And while it is the rarer case, Magic Online players can just as
6 readily pick up a deck of Magic cards and immediately play the game. Digitized artwork
7 reproduces the look of Magic, and in using a mouse, users click on cards to play them on a
8 virtual tabletop. Each game is hosted by the server, which applies a rules engine to enforce
9 proper play.

10 19. Players are free to set up or join games of their choice. In addition, official events
11 such as 8-man constructed, limited sealed deck and drafts, as well as larger tournaments take
12 place according to a regular schedule. Magic Online digital card sets are released online shortly
13 after they are released in paper form, thereby preserving the similarity of play.

14 20. Additionally, in 2009 Wizards began distributing its now annual video game,
15 Magic: The Gathering – Duels of the Planeswalkers with sequels released in 2011, 2012, 2013
16 and an upcoming sequel to be released in the summer of 2014 (collectively, "Duels"). Duels
17 follows the standard rules of Magic and features player vs. environment and player vs. player
18 modes, as well as campaigns, individual player unlockable features, puzzles, downloadable
19 content, and in-game item purchases. With millions of worldwide downloads and in-game
20 purchases, Duels is available on PC, Xbox 360, Xbox One, PlayStation 3 and Apple and Android
21 tablets.

22 21. Wizards has taken prudent steps to preserve the game against copying.
23 Attachment 1 hereto includes a list of copyrights granted and those currently filed and pending
24 which protect the several expressions of Magic including, but not limited to, the protectable
25 visual arts of its cards. Further, in 1997, Wizards received a patent on the technology it pioneered
26 in developing Magic, United States Patent No. 5,662,332 ("the '332 patent"), whose claim set

1 was enhanced by a re-issuance of the patent in 2003, as United States Patent No. RE 37,957 (“the
2 ‘957 patent”). The ‘957 patent issued with 60 claims, including over 25 independent claims,
3 which define both a card game that uses either trading cards or a computer-generated image
4 thereof and a method of playing the game.

5 22. Magic has succeeded with a loyal following; the magnitude of which has caused
6 some competitors to publish imitations, and on several occasions Wizards has identified and
7 resolved instances of infringement. Given the wide-spread popularity of Magic and its position in
8 the gaming ecosystem, there can be no doubt that Cryptozoic had access to every card, whether
9 tangible or virtual, including all cards protected by the copyright registrations and applications
10 contained in Attachment 1.

11 23. In 2012 Cryptozoic launched a “Kickstarter” fundraising campaign for the release
12 of Hex. Hex is a nearly identical game to Magic. Thus, Cryptozoic both had access to and had
13 copied Magic.

14 24. A press release Cryptozoic issued with the Kickstarter launch states “Kickstarter
15 supporters of Hex will be provided with a variety of unique collectable rewards including Beta
16 invites for early access to the game. Depending on their pledge level, backers can receive
17 exclusive cards only available through the Kickstarter campaign, customizable sleeves, starter
18 sets, booster packs, in-game bonuses such as increased loot drops and special equipment,
19 exclusive access to tournaments and much more. At the highest level, “Producer Tier” backers
20 will receive executive producer credit, a vanity card, and the once-in-a-lifetime opportunity to
21 create their own personalized trading card.” The descriptions of Hex that accompany the
22 announcement show cards and rules that nearly identically mimic those of Magic.

23 25. The Kickstarter campaign closed and the project was successfully funded on June
24 7, 2013. At the reporting website, the campaign is disclosed as having far exceeded its campaign
25 goals (i.e. <https://www.kickstarter.com/projects/cze/hex-mmo-trading-card-game/posts>, which
26 reports that 17,765 backers pledged \$2,278,255 on what had been a \$300,000 goal).

26. The gaming community has been very much impressed by the similarity of the two games. For example, one noted online gamer who authors a blog (<http://www.thresholdpodcast.com/magic-hex-mix/>) reported on the Hex game which he styles, “Threshold, the Hex Podcast.” On September 5, 2013, the author assured Magic players that they ought to try Hex by setting forth the substantial similarities of the games one to another:

Magic: The Gathering. For the majority of us, we’re not new to [Trading Card Games (“TCGs”)]. We probably have played Magic at some point in our lives that has led us to Hex. If we haven’t, we’ve probably heard about it... This article is written to help show the similarities between Magic and Hex. It’s also here to help those that want to learn about Hex. They can do so by playing Duels of the Planeswalker while they wait for the Hex alpha to hit.

27. The author then goes on to compare a Creature Card from Magic to a corresponding Troop Card from Hex.

Creature/Troop



Vampire Outcasts

Corrupt Harvester

1 Troops are just like creatures, they act the same way. In this example they both have
2 the equivalent ability of dealing damage and gaining that much life, Lifelink vs
3 Lifedrain. There are other abilities creatures can share from Magic:

4 Haste = Speed

5 Flying = Flight

6 Vigilance = Steadfast

7 Defender = Defensive

8 First Strike = Swiftstrike

9 Hexproof = Spellshield

10 Trample = Crush

11 28. Going still further, the author then picks up the next significant card sets, those of
12 Enchantments, Artifacts Sorcery and Instant Action from the Magic game and compares each,
13 respectively to the corresponding card sets, those of Constants, Artifacts, Basic Action, and Quick
14 Action from the Hex game:



Enchantment/Constant



Aven Shrine

Blessing the Fallen

Enchantments are pretty much the same as Constants. It wouldn't surprise me to see Creature Constant come along in an expansion or two. You can also have artifacts that give off effects like constants.

Artifact/Artifact



Pyrite Spellbomb

Sapper's Charge

Artifacts work the exact same way as they do in Magic. You can only cast them during your main phases. It wouldn't surprise me to see cast-able equipment come along in the game at some point.

Sorcery/Basic Action



Divination

Oracle Song

Sorceries are the same as Basic Actions. They can only work on your turn during the main phases, and only when you have priority and there is nothing that needs to be resolved.

Instant/Quick Action***Giant Growth******Wild Growth***

Instants work like Quick Actions. You can cast those at any time you have priority.

29. Finally, the author compares each game's resource system and describes the actions of the cards thus:

Lands are the same as Resources, they're what you use to play cards. In Magic you use a Forest to create 1 green mana. In Hex you use a resource to gain 1 wild (green) threshold which is semi equivalent to green mana, you also gain 1 resource for the turn and the game (1/1), and 1 charge for your champion. Every turn you gain your resources just like untapping your lands in Magic. Having 1 forest would allow you to play any card in Magic that has only 1 green mana symbol in the casting cost.

Go back and look through the examples. You'll see I've done my best to match up casting costs and effects. Vampire Outcasts has a converted casting cost of 4 (2 colorless, 2 black). Corrupt Harvester has a casting cost of 4 and you need to have at least 2 purple threshold. 2 purple thresholds would be equivalent to having two swamps in play.

*Forest**Wild Shard*

30. Other users in the gaming community were confused because of the near identity of the two games. On Cryptozoic's own forum a registered user, on December 1, 2013, stated, "I have played a lot of CCGs [Collectible Card Games], and for the most part, CCGs are very similar to each other. However, I've never seen a CCG that is as similar to another as Hex is to Magic." Another such member stated on the same day, "I am a game designer, so I can say that design-wise Hex=Magic. Hex is not "like" Magic, Hex is Magic, with a few tweaks to take advantage of the digital environment." (<http://forums.cryptozoic.com/showthread.php?t=24596&page=8>).

31. The rest of the forum resonated with similar remarks. For example, on June 10, 2013, a member stated "I'm not very worried about calling it a "clone" or not. But it is VERY similar to

1 Magic. I may be wrong but I feel that people who say “it's not THAT similar” or “any 2 games in the
 2 same genre will be similar” probably don't know many TCGs. I have played many TCGs, paper and
 3 digital, and none of them come as close to Magic as HEX. Yes, there are some digital tricks (most of
 4 them could be made to work in Magic, although with clumsier bookkeeping required) and a slightly
 5 different resource system, but otherwise is almost like a new skin over the same game. So the thing
 6 is, if HEX cannot be called a Magic clone, no other TCG can. HEX may not be a “clone” but it's the
 7 closest to one we have in the market.”

8 (<http://forums.cryptozoic.com/showthread.php?t=24596&page=8>).

9 32. The mechanics of Hex and the graphics in the electronic interface, mimic the actions
 10 of Magic Online and Duels. For example, functions such as duels between players are very similarly
 11 represented in each game. In Magic, the duel appears thus:



24 Screen shot of Duels of the Planeswalkers 2014

In Hex, the same function appears thus:



Screen shot of Hex: Shards of Fate

33. After announcements of the release of developmental versions of Hex, Wizards became aware that Cryptozoic had copied both the mechanics of play and the general look and feel of Magic. Wizards also became aware that members of the gaming community had, like those referenced above, played the game and had determined the game to be a nearly identical copy of Magic. Indeed, on a website hosted by Cryptozoic, itself, in its description of gameplay stated, in response to questions about the similarity, "If it ain't broke, don't fix it" (see <https://hextcg.com/tell-all-your-friends>).

34. Wizards moved to preserve and protect its intellectual property. In March of 2014, Wizards contacted Cryptozoic and informed them of Wizards' rights in the Magic game. Wizards offered multiple opportunities to Cryptozoic to resolve this matter short of a formal assertion. The chart below summarizes the nature and number of copied elements that Wizards found unacceptable

Magic	HEX
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1	20 starting life	20 starting life
2	Win = remove all life or run opponent out of	Win = remove all life or run opponent out of
3	cards	cards
4	Turn cards ("tap") to designate a card action	Turn cards ("tap") to designate a card action
5	(attack or use ability)	(attack or use ability)
6	Untap cards at the beginning of each card	Untap cards at the beginning of each card
7	Creatures feature power and toughness and	Creatures feature power and toughness and
8	damage resets at the beginning of every turn	damage resets at the beginning of every turn
9	5 types of spells and creatures (red, blue,	5 types of spells and creatures (red, blue,
10	green, white and black)	green, white and black)
11	Colorless (artifact) spells and creatures	Colorless (artifact) spells and creatures
12	7 card starting hand	7 card starting hand
13	Draw 1 card per turn	Draw 1 card per turn
14	Maximum Hand Size = 7	Maximum Hand Size = 7
15	Allowed to play one resource per turn (one	Allowed to play one resource per turn (one
16	mana card)	mana card)
17	Combat (attacking and choosing blockers)	Combat (attacking and choosing blockers)
18	Card resolution (first in, last out "stack"	Card resolution (first in, last out "stack"
19	resolution)	resolution)
20	Card Types and Effects	Card Types and Effects
21	<ul style="list-style-type: none"> • Enchantment 	<ul style="list-style-type: none"> • Constant
22	<ul style="list-style-type: none"> • Artifact 	<ul style="list-style-type: none"> • Artifact
23	<ul style="list-style-type: none"> • Creature 	<ul style="list-style-type: none"> • Troop
24	<ul style="list-style-type: none"> • Land 	<ul style="list-style-type: none"> • Resource
25	<ul style="list-style-type: none"> • Instant 	<ul style="list-style-type: none"> • Quick Action
26	<ul style="list-style-type: none"> • Sorcery 	<ul style="list-style-type: none"> • Basic Action
	Rarity	Rarity
	<ul style="list-style-type: none"> • Common 	<ul style="list-style-type: none"> • Common
	<ul style="list-style-type: none"> • Uncommon 	<ul style="list-style-type: none"> • Uncommon

<ul style="list-style-type: none"> • Rare • Mythic Rare 	<ul style="list-style-type: none"> • Rare • Legendary
Booster Pack Distribution <ul style="list-style-type: none"> • 1 Rare (or Mythic Rare), 3 Uncommons, 11 Commons 	Booster Pack Distribution <ul style="list-style-type: none"> • 1 Rare (or Legendary Rare), 3 Uncommons, 11 Commons
Turn Structure <ul style="list-style-type: none"> • Untap • Upkeep • Draw • First Main • Combat <ul style="list-style-type: none"> - Declare Attackers - Declare Defenders - Assess Damage • Second Main • End 	Turn Structure <ul style="list-style-type: none"> • Untap • Upkeep • Draw • First Main • Combat <ul style="list-style-type: none"> - Declare Attackers - Declare Defenders - Assess Damage • Second Main • End
Land cards referred to as “Mana”	Resource Cards referred to as “Mana”
Deck referred to as “Library”	Deck referred to as “Library”
Discard pile referred to as “Graveyard”	Discard pile referred to as “Graveyard”
Deck Size = 60 cards	Deck Size = 60 cards
Maximum number of cards in a deck = 4	Maximum number of cards in a deck = 4
Mulligan Rule (redraw starting hand with one less card; multiple times)	Mulligan Rule (redraw starting hand with one less card; multiple times)
Creatures may not be played the turn they come into play (“summoning sickness”)	Creatures may not be played the turn they come into play (“summoning sickness”)
Creature Abilities (“Card Mechanics”) <ul style="list-style-type: none"> • Haste • Flying • Vigilance • Defender • First Strike 	Current Hex Card Mechanics are the same as Magic <ul style="list-style-type: none"> • Speed • Flight • Steadfast • Defensive • Swiftstrike

- | | |
|--|---|
| <ul style="list-style-type: none"> • Hexproof • Trample • Indestructible • Lifelink • Bushido • Bushido • Bushido • Bushido • Bushido | <ul style="list-style-type: none"> • Spellshield • Crush • Invincible • Lifedrain • Rage • Rage 1 • Rage 2 • Rage 3 • Rage 4 |
|--|---|

35. In spite of earnest negotiations, Cryptozoic found none of the offered opportunities acceptable. As such, the negotiations reached impasse, necessitating the instant suit.

**V. FIRST CAUSE OF ACTION
COPYRIGHT INFRINGEMENT [17 U.S.C. §§101, SEQ.]**

36. Wizards refers to and incorporates paragraphs 1 to 35 above as though fully set forth herein. Wizards has suitably registered or applied for registration for copyrights for Magic as set forth in Attachment 1 hereto and through Wizards' own extensive publication of the game, Cryptozoic has had access to the copyrighted material.

37. Cryptozoic copied the cards, plot, elements, circumstances, play sequence, and flow of Magic. Players in both games are confined to the same parameters based on an initial dealing of seven cards and play progresses in a substantially identical manner. Players must efficiently use their skill and calculation to assemble their initial decks and then in suitable selection and play of the various cards.

38. Cryptozoic copied the overall plot, elements, theme, mood, setting, pace, creatures, and sequence of Magic. As demonstrated in more detail above and as will be shown at trial, Cryptozoic copied the physical layout and ornamental aspects of Magic cards, the visual presentation of each card on the screen is substantially similar to the same sort of card within the Magic card game in either its paper or electronic versions; the sequence and flow of the game, the scoring system used by the game, and the overall look and feel of the game are identical.

39. In short, Cryptozoic has produced a nearly identical copy of Magic, including the original selection and arrangement of multiple elements of Magic. Cryptozoic copied Magic in a manner that clearly infringes on Wizards' copyrights and unless Cryptozoic is enjoined, it will continue do so. At no time did Wizards authorize Cryptozoic to reproduce, adapt, or distribute Magic.

40. Further, by its sales through the Kickstarter campaign, Cryptozoic has obtained in excess of two million dollars, a sum that constitutes one of a number of losses of related revenues Wizards could reasonably have expected to earn.

41. As a direct result of Cryptozoic's actions, which constitute an infringement of Wizards' rights, Wizards has sustained, and will continue to sustain, substantial injury, loss, and damages in an amount exceeding \$500,000.00 and as proven at trial.

42. Wizards is entitled to a permanent injunction restraining Cryptozoic, its officers, directors, agents, employees, representatives, and all persons acting in concert, from engaging in further acts of copyright infringement.

43. Wizards is further entitled to recover from Cryptozoic the gains, profits and advantages Cryptozoic has obtained as a result of their acts of copyright infringement. Wizards is at present unable to ascertain the full extent of the gains, profits and advantages Cryptozoic has obtained by reason of their acts of copyright infringement, but Wizards is informed and believes, and on that basis alleges, that Cryptozoic obtained such gains, profits and advantages in an amount exceeding \$500,000.00.

VI. SECOND CAUSE OF ACTION

(LANHAM ACT UNFAIR COMPETITION, FALSE ENDORSEMENT AND FALSE DESIGNATION OF ORIGIN [15 U.S.C. 1125(A)])

44. Wizards refers to and incorporates paragraphs 1 to 43 above as though fully set forth herein.

1 45. Cryptozoic deliberately and intentionally copied the game play, rules, player
2 interaction with the game, layout and arrangement, visual presentation, sequence and flow,
3 scoring system, and Magic's overall look. By duplicating the "total image and overall
4 appearance of a product," Cryptozoic has copied Magic's particular trade dress, the copying of
5 which shows confusion among Wizards' customers.

6 46. The distinctive design of the Magic cards is not essential to the use or purpose of
7 the game nor does the design affect the cost or quality of the cards; the design is merely an
8 ornamental arrangement of features, some of which are functional. For these reasons the
9 distinctive design of the Magic cards and the arrangement of features are protectable as trade
10 dress in either the paper or electronic versions of Magic.

11 47. Cryptozoic copied Magic in a manner that clearly infringes on Wizards' trade
12 dress and unless Cryptozoic is enjoined, it will continue to do so. At no time did Wizards authorize
13 Cryptozoic to reproduce, adapt, or distribute Magic.

14 48. The visual appearance of Magic has a unique look and feel comprised of
15 distinctive characteristics, including, but not limited to, the arrangement of the individual cards.
16 These characteristics of Magic have come to identify Magic and its source and thus serve as
17 protectable trade dress. Magic's trade dress is non-functional and is inherently distinctive or has
18 acquired distinction within the meaning of the Lanham Act.

19 49. Through their use of the misleading design and look-and-feel of Hex, Cryptozoic
20 is knowingly and intentionally misrepresenting and falsely designating to the general public the
21 affiliation, connection, association, origin, source, endorsement, sponsorship and approval of
22 Hex, and intends to misrepresent and falsely designate to the general public the affiliation,
23 connection, association, origin, source, endorsement, sponsorship and approval of Hex by
24 Wizards, so as to create a likelihood of confusion by the public as to the affiliation, connection,
25 association, origin, source, endorsement, sponsorship and approval of Hex.
26

1 50. Cryptozoic's conduct has been intentional and willful, and is calculated
2 specifically to trade off the goodwill that Wizards has developed in its successful Magic games,
3 making this an exceptional case under 15 U.S.C. § 1117.

4 51. The aforesaid acts of Cryptozoic constitute false designation of origin, false
5 endorsement, and unfair competition in violation of 15 U.S.C. § 1125(a)(1)(A).

6 52. Further, by its sales through the Kickstarter campaign, Cryptozoic has obtained in
7 excess of two million dollars, a sum that constitutes one of a number of losses of related
8 revenues Wizards could reasonably have expected to earn.

9 53. As a direct result of Cryptozoic's actions infringing Wizards' trade dress rights,
10 Wizards has sustained, and will continue to sustain, substantial injury, loss, and damages in an
11 amount exceeding \$500,000.00 and as proven at trial. Wizards is entitled to a permanent injunction
12 restraining Cryptozoic, its officers, directors, agents, employees, representatives, and all persons
13 acting in concert, from engaging in further acts of trade dress infringement.

14 **VII. THIRD CAUSE OF ACTION**

15 **(PATENT ACT – PATENT INFRINGEMENT; [35 U.S.C. 271])**

16 54. Wizards refers to and incorporates paragraphs 1 to 53 above as though fully set
17 forth herein.

18 55. Cryptozoic deliberately and intentionally copied the game play, rules, player
19 interaction with the game, layout and arrangement, visual presentation, sequence and flow,
20 scoring system, and Magic's overall look. By duplicating the rules, scoring, and cards,"
21 Cryptozoic has copied Magic's then-inventive game.

22 56. In 1997, Wizards received Letters Patent denominated United States Patent No.
23 5,662,332 ("the '332 patent") on that inventive game, rules and playing cards, and then received
24 the subsequent reissue as United States Patent No. RE 37,957 ("the '957 patent"). The '957
25 patent issued with 60 claims, including over 25 independent claims, that cover both a card game
26 that uses trading cards and a method of playing the game as describe above. Wizards has owned

1 the patent throughout the period of the defendant's infringing acts and still owns the patent.
 2 Wizards has also marked the patent number(s) on the physical products.

3 57. Cryptozoic has infringed and is still infringing the '957 patent by making, selling,
 4 and using the cards and method that embody the patented invention, and Cryptozoic will
 5 continue to do so unless enjoined by this court.

6 58. Wizards has complied with the statutory requirement of placing a notice of the
 7 '957 patent on all sets of cards it manufactures and sells either electronically or in paper
 8 embodiments, and has given Cryptozoic written notice of the infringement.

9 59. Wizards is entitled to a permanent injunction restraining Cryptozoic, their
 10 officers, directors, agents, employees, representatives and all persons acting in concert with them
 11 from engaging in the conduct described herein that violates the Lanham Act.

12 60. Wizards is further entitled to recover from Cryptozoic the gains, profits, and
 13 advantages Cryptozoic has obtained as a result of their violation of the Patent Act. Wizards is at
 14 present unable to ascertain the full extent of the gains, profits, and advantages Cryptozoic has
 15 obtained by reason of their acts of patent infringement, but Wizards is informed and believes,
 16 and on that basis alleges, that Cryptozoic obtained such gains, profits, and advantages in an
 17 amount exceeding \$500,000.00.

18 **VIII. PRAYER FOR RELIEF**

19 **WHEREFORE**, Wizards prays for judgment against Cryptozoic as follows:

20 1. For a permanent injunction enjoining Cryptozoic and all persons acting in concert
 21 with them from manufacturing, producing, distributing, adapting, displaying, advertising,
 22 promoting, offering for sale and/or selling, or performing any materials that are substantially
 23 similar to Magic and to deliver to the Court for destruction or other reasonable disposition all
 24 materials and means for producing the same in Cryptozoic's possession or control;

25 2. For a permanent injunction, enjoining Cryptozoic and all persons acting in concert
 26 with them from using the trade dress of Magic in connection with any paper, electronic, or web-

1 based trading card video game or from otherwise using Wizards' trade dress, as embodied in
2 either of the paper or electronic forms of Magic or any confusingly similar use thereof, in any
3 way causing the likelihood of confusion, deception, or mistake as to the source, nature, or quality
4 of Cryptozoic's games and to deliver to the Court for destruction or other reasonable disposition
5 all materials bearing the infringing trade dress in Cryptozoic's possession or control;

6 3. For any and all damages sustained by Wizards;

7 4. For all of Cryptozoic's profits wrongfully derived from the infringement of
8 Wizards' intellectual property rights;

9 5. For a Judgment against Cryptozoic declaring this case to be exceptional under the
10 Patent Act and therefore subjecting Cryptozoic to liability to include treble damages as
11 authorized under Section 285 of the Patent Act;

12 6. For reasonable attorney's fees;

13 7. For costs of suit herein; and

14 8. For other such relief as the Court deems proper.

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16
17 RESPECTFULLY SUBMITTED this 14th day of March, 2014.

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